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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL.,

Appellants,

v.

DAVID H. KURTZMAN, AS SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL.,

Appellees.

BRIEF FOR AMICUS CURIAE CITIZENS FOR EDUCATIONAL FREEDOM

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INTEREST OF THE AMICUS

The organization of Citizens for Educational Freedom (CEF) was conceived and has labored to speak for the principal, but for the most part unrepresented, party in the educational aid debate which has been the focus of national attention for the past decades. It is the cause of parents and school children, not schools as such. CEF is dedicated to excellence, equality, and freedom in education for every American child, regardless of race, creed, color or school attendance. CEF is a national, non-sectarian, non-partisan, and non-profit civic organization.

CEF deems it fundamental that in education at *every* level the rights of freedom in learning, speech and of communication of thought, conscientious conviction and philosophic orientation be recognized as paramount. Basic to such contention is the belief that unless there exists a *viable* alternative to state-operated public schools reasonably available to every child, educational freedom and diversity cannot be said to exist, educational equality must remain but a phrase, and educational excellence be made difficult if not impossible of attainment for all but the well-to-do. Citizens for Educational Freedom supported the passage of The Pennsylvania Nonpublic Elementary and Secondary Education Act (No. 109 of 1968) as an implementation of its view that unless nonpublic schools can continue in being, First Amendment freedoms in education will very soon exist only as historical memories.

This brief is filed with the written consent of all of the parties, and in support of the decision below which held that Act 109 is valid and not in violation of any provisions of the Constitution of the United States.

ARGUMENT

I

PENNSYLVANIA ACT 109 IS CONSTITUTIONAL IN ALL ASPECTS

The Pennsylvania law for the purchase of secular educational services makes possible the continued exercise of the freedoms protected under the First Amendment and does not violate the establishment prohibition of that Amendment. The Act encourages the pursuit of education and assists parents to comply with the Pennsylvania compulsory education law while, at the same time, making it a continued possibility for parents to exercise their right to send their children to a non-public school of their free choice. It is clear that the State has a proper interest in furthering the

secular education of all its resident children and that so long as it does not involve itself in any religious exercise and subjects, it can provide secular educational services for those children in a variety of ways. The conclusion is supported not only by the precedents of this Court as reviewed and elaborated in *Board of Education v. Allen*, 392 U.S. 236 (1968) but by the many Federal and state legislative judgments expressed in a host of educational aid programs covering non-public education since 1945. The federal constitution does not prohibit state support of secular educational services in non-public schools.

The Pennsylvania Act cannot be seen, other than in the context of the unquestioned economic crisis facing non-public as well as public education. That economic crisis, which is nation-wide, foredooms non-public education in Pennsylvania and elsewhere unless some step such as the Pennsylvania Act is accomplished and upheld. Further, with the death of non-public education—now a growing reality in many areas of the Country (See message of President Nixon to Congress on Educational Reform, March 3, 1970; Weekly Compilation of Presidential Documents, V. 6, No. 10, pp. 304, at p. 312)—there will also be all of those freedoms, together with the products of those freedoms, which are so precious and essential to an open American society, and also to the well being of the public schools. The Pennsylvania Act has a sound secular educational and social objective. Viewed in that context, no practical alternative to such an aid proposal exists except to promote a total monopoly of all education in the state, with the evils which that portends.

II

FREEDOM OF CHOICE IN EDUCATION WHICH IS THE KEYSTONE OF A FREE ACADEMIC COMMUNITY, THE BULWARK AGAINST A MONOLITHIC STATE EDUCATIONAL SYSTEM AND THE SOLE MEANS BY WHICH PARENTS CAN TRULY EXERCISE EDUCATIONAL AND RELIGIOUS CONVICTIONS FUNDAMENTAL TO AN OPEN SOCIETY, MERITS CONSTITUTIONAL PROTECTION, NOT CONSTITUTIONAL DESTRUCTION

It is standard for opponents of any form of education assistance to children in non-public schools to predict th possibility of such aid precipitating the dissolution of on country's public schools. Apparently this argument is base upon a conviction that if the student clientele of publ schools were truly free to exercise their real education choice they would leave the public schools in droves. Suc a consequence surely must be characterized as extremel speculative at best. Based upon this unlikely prospect, th conclusion nevertheless is advanced that it is essential to th survival of public schools to oppose such assistance to no public education of whatever nature even if the result is t extinguish non-public education altogether.

In opposition to the surely questionable speculations o the undoing of public education by programs making free dom of choice in education practical, there exists today i Pennsylvania and throughout America, the reality that no public education is in fact being reduced at a disastrous rat of attrition because educational freedom cannot econom ically be exercised. The fact is that unless aid of the so adopted by Pennsylvania in Act 109 is legislated and up held, non-public education in America will soon cease t exist in any meaningful sense.

Thus, there is posed for this Court a much larger issu than the extremely important one placed before it on th face of this case. The fundamental issue at stake is whethe in fact there is to remain in the United States any alterna tive whatsoever to state operated public schools.

In this regard, many persons equate parental choice of a non-public school for their children with some sort of legal license or privilege. They argue that if parents want to participate in public benefits, then let them surrender their constitutionally protected choice of a non-public school; otherwise, they must expect to suffer the penalty of denial of any meaningful public welfare benefits in education.

The Supreme Court long ago established that freedom to choose a non-public school was not a mere permissive state license when it held unconstitutional the Oregon law requiring all children to attend state public schools only:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nuture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." (*Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925))[1]

The connection between the exercise of parental rights and fundamental freedom is indisputable.[2] To disable a

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[1]The *Pierce* decision was universally hailed upon its issuance as an "end to the effort to regiment the mental life of Americans through public school instruction." The Court," . . . stifled the recrudescence of intolerance." *New Republic*, Felix Frankfurter, June 17, 1925. The New York *Times* compared the Oregon law to those in effect in Russia and Turkey requiring attendance at state schools. April 2, 1924. One historian felt the case significant as preceding by constitutional denial the developments later to come into being in Nazi Germany. Stokes, *Church and State in the United States*, Vol. II, p. 741.

[2]"To say that education regards the family is to take no notice of the present realities. Only the state can educate them." Fascist Party statement, II *Messaggero*, Rome, July 14 and 26, 1929. "When an opponent declares, 'I will not come over to your side,' I (Adolph Hitler) calmly say, 'Your child belongs to us already . . . What are you? You will pass on. Your descendants, however, now stand in the new camp. In a short time they will know nothing else but this

state, on constitutional grounds, to encourage such freedoms would be to undermine the very principle in *Pierce*. It would be to encourage the very result sought by the State of Oregon in *Pierce*.[3]

How much of what was to become the tragic history of the world under totalitarianism, (the philosophy implicit in the argument of the Oregon counsel in *Pierce*), was foreseen in the important decision of *Meyer v. Nebraska*, 262 U.S. 390 (1923) which nullified a law barring the use of languages other than English in private schools:

> "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such

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new community.' " *The Rise and Fall of the Third Reich*, Shirer, Simon and Shuster, page 249.

"This new Reich will give its youth to no one, but will itself take youth and give youth its own education and its own upbringing." Statement of Adolph Hitler, May 1, 1937, page 249, *ibid.*

[3]It is of interest to note in this respect that educators generally are in accord that the removal of religion from the educational process *cannot* be accomplished in any school, public or non-public. See, for example, *The Scholars Look at the Schools*, National Education Association, Washington, D. C.: Association for Supervision and Curriculum Development, N.E.A., 1962, p. 18, where the author stated:

> "There is no teacher, no school, which can escape the problem of life orientation, the ultimate commitments by which every person must live. Every analysis of life and culture must take account, either implicitly or explicitly, of those fundamental commitments which underlie every human action. This is precisely the domain of religion. Democracy, communism, and the various economic systems cannot be analyzed in their most profound dimensions without getting into the question of ultimate values. This is, finally, a religious question."

restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution." *Id.* at 402.

The case of *Farrington v. Tokushige*, 273 U.S. 284 (1927) struck down a Hawaiian law placing foreign language schools under unreasonable state restrictions. In *Farrington*, the Court held that the law effectively destroyed such schools and thereby "unconstitutionally deprives parents of the right to direct the education of their children." (Syllabus 4). Thus the nexus between parental freedom, and the viability of the school was clearly established.

More recently, the Supreme Court expressed its reluctance "to permit a single, ironclad system of education to be imposed upon a nation composed of so many strains, stating, we have held that, even though public education is one of our most cherished democratic institutions, the Bill of Rights bars a state from compelling all children to attend the public schools." Minersville School Dist. v. Gobitis, 310 U.S. 586, 599 (1940).

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court showed particular sensitivity to avoid unnecessary restrictions upon cherished fundamental liberties:

> "The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice - whether public or private or parochial - is also not mentioned. Nor is the right to study any particular subject or foreign language. Yet the First Amendment has been construed to include certain of those rights.
>
> By *Pierce vs. Society of Sisters*, supra, the right to educate one's children as one chooses is made applicable to the States by force of the First and Fourteenth Amendments. By *Meyer vs. Nebraska*, supra, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of

> available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (*Martin vs. Struthers*, 319 U.S. 141, 143) and freedom of inquiry, freedom of thought, and freedom to teach (see *Wieman vs. Updegraff*, 343 U.S. 183, 195) - indeed the freedom of the entire university community. *Sweezy vs. New Hampshire*, 354 U.S. 234, 249-50, 261-63; *Barenblatt vs. United States*, 360 U.S. 109, 113; *Baggett v. Bullitt*, 377 U.S. 360, 369; *Without those peripheral* rights the specific rights would be less secure. And so we affirmed the principle of the *Pierce* and the *Meyer* cases." *Id.* at 482-83.

There can be few liberties of greater importance in the hierarchy of freedoms. The right of free choice in education is an international standard by which a nation's respect for liberty is measured. See *United Nations Declaration on Human Rights*, Article 16 (3) and Article 26 (3) to that effect. And *United Nations Declaration on the Rights of the Child*, November 20, 1959. See *Protocol* to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, March 20, 1952) which states in part, "In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." (United Nations Treaty Series, 1955, p. 262.).

These considerations were given eloquent voice by Justice Brennan concurring in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) *Id.* at 242:

> "The choice between these very different forms of education is one–very much like the choice of whether or not to worship–which our Constitution leaves to the individual parent. *It is no proper function of the state or local government to influence or restrict that election. The lesson of history–drawn more from the experiences of other countries than from our own–is that a system of free public education forfeits its unique contribution to the growth*

of democratic citizenship when that choice ceases to be freely available to each parent." (emphasis added)

From the foregoing discussion and based upon the precedents referred to, we believe certain conclusions are inescapable:

The Constitutional right of the parent to select the school for the education of his children should also enjoy a high priority in social policy and law. Parental freedom in education insures a free academic community and is a guarantee against the imposition of a monolithic state operated system of education which, without diversity of other systems, can become both pedagogically and politically deadening.

The state may, therefore, consistent with the best traditions of permitting freedom and voluntarism, assist parents to educate their children in the school of their choice by assisting the secular educational functions of those schools. This would promote, not undermine, government neutrality in education or religion, because, in the mass welfare state, where the inability of parents to support private education is substantially brought about by massive government taxation and spending of private tax contributions, the denial of such aid, in law as well as in policy, would cast the government in a dispensing role, not of fair neutrality, but of hostility toward individual choice of non-public education.

III

THE DECISION BELOW SHOULD BE AFFIRMED

A. *The Constitutional Test under the Religion Clauses of the First Amendment:* CEF contends that the opinion of the Court below, both in its reasoning, and in its analysis of principles laid down by the Supreme Court of the United States is sound, on both the issues of standing to sue, and the issues on the meaning and application of the Religion Clauses of the First Amendment. By its very terms, Act 109 is manifestly designed to carry forward a secular legis-

lative purpose and to assure a primary secular educational effect that neither advances or inhibits religion. In no way does it coerce any citizen in the practice of his religion. Act 109 thus falls squarely within the rationale of *Board of Education v. Allen*, 392 U.S. 236 (1968) as recently cited approvingly in *Walz v. Tax Commission*, 397 U.S. 664, at 672, (1970).

B. *Issues of Standing to Sue:* The interest of CEF on these issues indirectly bears upon the merits of persistent attacks upon educational aid legislation by groups which are ideologically opposed to any practical enablement of free choice in education. Such groups or persons assert essentially policy or legislative objections to Act 109, and the legislature is the proper forum for seeking to prevent or repeal statutes which they oppose on ideological grounds. If they lack any personal stake in the statutory operation, they should not be permitted to press their attacks in a judicial forum, and seek to have the court act as a court of revision of legislative policy.

For the reasons stated in the precedents of the Supreme Court of the United States, as cogently outlined in the opinion of the court below, CEF contends that, of all the plaintiffs in this case, only the plaintiff, Lemon, alleged any basis for standing to sue, and then only to raise the issue whether Act 109 violated the Establishment Clause.

CONCLUSION

It is respectfully submitted that, in the interest of a true and practical neutrality toward freedom of choice and of academic freedom of parents and school children and in line with the governing constitutional principles and precedents of this court, Pennsylvania Act 109 is valid on its face: the

judgment of the Three Judge District Court below, therefore, should be affirmed.

Respectfully Submitted,

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